United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig with affidavit of mlg

76-1564

To be argued by
RICHARD APPLEBY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1564

Brls

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT JACKSON, WILLIAM SCOTT, and MARTIN ALLEN,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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UNITED STATES OF AMERICA,

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Preliminary Statement

Robert Jackson, William Scott and Martin Allen appeal from judgments of conviction entered on November 23, 1976, in the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) following a bench trial, convicting them of conspiracy to commit the armed robbery on June 14 and June 21, 1976 of the Manufacturers Hanover Trust, at 210 Flushing Avenue, Brooklyn, New York (Count One; 18 U.S.C. § 371); of two instances of attempted robbery on the above dates (Counts Two and Three; 18 U.S.C. § 2113(a)); and of possession of two unregistered sawed-off shotguns (Count Four; 26 U.S.C. § 5861(d) and 18 U.S.C. § 2). Jackson was sentenced to 2 years imprisonment on Count One and was given a suspended sentence with a three year

term of probation on each of the other counts. Scott received 5 years imprisonment on Count One and 7 years imprisonment on the remaining three counts, all counts to run concurrently. Allen received 5 years imprisonment on Count One and 10 years imprisonment on the remaining three counts, all counts to run concurrently. All three appellants are in custody serving their sentences.

While conceding that the evidence established the lesser charge of conspiracy, all appellants contend that, as a matter of law, the facts did not establish an attempt to commit bank robbery. In addition, Scott contends that 26 U.S.C. § 5861(d) permits conviction only of individuals who have actual (and not constructive) possession of an unregistered weapon. He argues that since the Government's proof did not establish he actually possessed one of the two shotguns he should have been acquitted on Count Four. Allen contends that the F.B.I. agents who staked out the bank on June 21st did not have probable cause to arrest him and that hence evidence recovered as the fruit of his arrest should have been suppressed.

Statement of Facts

1. The conspiracy and the attempted bank robbery

On June 11, 1976, unindicted co-conspirator Vanessa Hodges was introduced to appellant Allen by her friend, Pia Longhorne.[1] Hodges proposed to Allen that they rob the Manufacturers Hanover Trust, located at 210 Flushing Avenue in Brooklyn with the week-end deposits as the target. She further suggested that the robbery

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[1] Hodges pled guilty on September 23, 1976 to conspiracy to rob the Chemical Bank, 395 Flatbush Avenue Extension, Brooklyn, New York. She was sentenced to five years probation.

take place the following Monday at 7:30 a.m., so that the robbers would enter the bank at the same time the bank manager was scheduled to open the bank (T. 11-12).[2] Allen agreed to the plan and said that he would provide two sawed-off shotguns and a .38 revolver (T. 12).

The following Monday morning, June 14, at approximately 7:30 a.m., Allen met Hodges at Pia Longhorne's house. The two entered a car driven by appellant Jackson and set off for the bank (T. 14). A suitcase in the back seat contained a sawed-off shotgun, ammunition, masks and a pair of handcuffs which were to be used to immobilize the bank manager (T. 16). The three arrived at the bank behind schedule at 8:00, however, so that it was too late to accost the manager when he arrived. Their plans thus thwarted, Hodges, Allen and Jackson went to a nearby restaurant to reassess the situation (T. 22).

At 9:00 a.m. the threesome returned to the bank (T. 15, 44). Leaving Jackson as the getaway driver, Allen and Hodges exited the car and observed the night deposit bags through the bank's window. The two decided, though, that it would be too risky to rob the bank without the help of a third person (T. 22). Meanwhile, Jackson, who had remained in the car, put some cardboard in front of the vehicle's license plate (T. 22, 24). After Allen and Hodges returned from their surveillance they rode around the bank for a short time and then drove off to Coney Island to locate appellant Scott, whom they thought would be a possible confederate.

After Scott was found in Coney Island and the robbery scheme was explained to him, he agreed to join the con-

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[2]References preceded by "T." are to pages of the trial transcript of August 30, 1976. References preceded by "H." are to pages of the probable cause hearing of July 23, 1976.

spiracy (T. 24-25). Allen obtained another sawed-off shotgun, and the three appellants and Hodges returned to the bank. Allen went inside first to locate the position of the bank surveillance cameras (T. 27). Scott then entered and observed that the night deposit bags were already being separated (T. 27). Meanwhile, Jackson had put some cardboard with a false license number over the license plate of the car. After Scott reported that the night deposit bags had already been processed, the four decided not to put their plans in operation that day (T. 30). The robbery was rescheduled for Monday, June 21, at 7:30 a.m. The group then returned to Coney Island. In preparation for the robbery, Hodges purchased a pair of stockings to wear over her head, and Hodges, Scott and Allen bought gloves to prevent their fingerprints from being left at the scene of the crime (T. 31).

However, while appellants were waiting for the 21st, Hodges was arrested on June 18th for an unrelated bank robbery. She immediately began to cooperate and told the Federal Bureau of Investigation ("FBI") about the forthcoming robbery at Manufactures Hanover (T. 34). She informed the agents of the location of the target bank, that the robbery would be committed by "two or three black males [who would be] driving a brown vehicle, using cardboard license plates [and who would be] armed with shoulder weapons and hand weapons" (H. 40). Hodges also provided the FBI with descriptions of the would-be robbers and stated that one of the conspirators had "one strange type of eye or one problem with an eye" (H. 55). Under the supervision of the agents, Hodges made a telephone call to appellant Allen. Allen told Hodges "that he wasn't going to do the job . . . because I (Hodges) got busted and the Feds would be

watching" (T. 34). Nevertheless, FBI agents took up surveillance at the bank on June 21st at 7:00 a.m.[3]

At approximately 7:30 a.m. agents observed appellants in the area of the bank driving a brown Lincoln sedan with a cardboard license plate on the rear (H. 30, 32; T. 92). The car drove past the bank in an easterly direction, circled the block and then parked at a fire hydrant on Washington Avenue, south of Flushing Avenue (H. 32; T. 77). (The bank is located on the southeast corner of Washington Avenue and Flushing Avenue). Scott, who was observed to have an apparently abnormally focused eye, exited the car, walked to the corner and peered into the bank (H. 33-34; T. 77-78). He then reentered the Lincoln, and the car turned left on Flushing Avenue and proceeded in a westerly direction; it made a U-turn and stopped on the southerly side of Flushing Avenue, between Washington Avenue and Waverly Avenue (west of the bank) (H. 36-37; T. 77). Thereafter, it proceeded in a easterly direction for two blocks past the bank again, and turned south on Grand Avenue, where it stopped (H. 63). Jackson exited the car (H. 63). The vehicle then returned to its previous position on Flushing Avenue, between Washington and Waverly Avenues and remained there for approximately twenty minutes (H. 38).

Apparently suspecting that they were being surveilled, appellants decided to abort the robbery and leave the area. The sedan proceeded at an accelerated rate of speed easterly on Flushing Avenue, then southerly on Grand Avenue (H. 65; T. 92-93). The agents then closed in

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[3] None of the appellants either testified or called any witnesses. The testimony of the F.B.I. agents given at the pretrial suppression hearing was accepted, apart from the hearsay, as their direct trial testimony (65-66).

and arrested appellants (H. 66). In the car, they found an open, zippered suitcase which contained two loaded, sawed-off shotguns and handcuffs (H. 66-67; T. 82, 84-85). It was stipulated that the sawed-off shotguns were not registered in the National Firearms Registration and Transfer Record (T. 87).

2. The findings of the court

A hearing was held on August 9, 1976 to determine whether probable cause existed for the search and seizure of the sawed-off shotguns from the arrest of appellants. Judge Mishler concluded that the information supplied by Vanessa Hodges did not constitute probable cause since her reliability had not been previously tested. However, the judge found that the observations of the agents supplied sufficient confirmation to establish probable cause for the arrest. Accordingly, the court denied the motion to suppress the weapons and other items of evidence which were seized incident to the arrest.[4]

In an opinion dated September 22, 1976, Judge Mishler found that the Government proved an attempted bank robbery on both June 14 and June 21. The court also found appellants guilty of conspiracy (a finding which appellants do not dispute) and of possession of unregistered weapons.[5]

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[4] See Judge Mishler's opinion at Section "C" of appellant's joint appendix.

[5] See Judge Mishler's opinion at Section "D" of appellants' joint appendix.

ARGUMENT

POINT I

There Was Probable Cause To Arrest Appellants.

Appellant Allen argues that the agents lacked probable cause to arrest him since Vanessa Hodges' reliability as an informer had not been established prior to the information she gave the agents concerning the June 21st robbery. Hence, it is argued that the evidence seized incident to the arrests should have been suppressed. This argument is totally without merit.

Hodges was a criminal participant with appellants in the June 14th attempt. Accordingly, the agents could have arrested appellants based solely upon her disclosures without any corroboration of the information or without any showing of previous reliability. *United States* v. *Rueda*, Docket No. 76-1429, slip op. 1765, 1773 (2d Cir. February 10, 1977).

However, if corroboration was required, it was there. Hodges gave detailed information to the agents about the forthcoming robbery. She provided the FBI the location of the target bank, the date and time of the planned robbery, a description of all the robbers, including the fact that one of the robbers had a "strange" eye. Hodges also advised that the robbers expected to use a brown motor vehicle and that they would affix a cardboard license plate to hide the licence number; she said they would be heavily armed with shoulder and hand weapons. As indicated in the Statement of Facts, each and every piece of the above information was corroborated by the agents' observations on June 21st. Here, the agents did not have corroboration of merely innocent aspects of

Hodges' story, which itself would have been sufficient corroboration, but there was corroboration directly linking the suspects to the commission of the crime. *See*, *United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972). Clearly, the agents had "knowledge of facts and circumstances 'sufficient to warrant a prudent man in believing' that an offense is being or has been committed." *United States* v. *Edmonds*, 535 F.2d 714, 719 (2d Cir. 1976), quoting from *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Since there was probable cause for the arrest of appellants, Judge Mishler properly denied the motion to suppress evidence seized incident to the arrest.

POINT II

The Evidence Established An Attempt to Commit Bank Robbery on June 14 and June 21, 1976.

Appellants argue that as a matter of law the evidence did not establish that there had been an attempted bank robbery within the meaning of T. 18, U.S.C. § 2113(a).[6] Specifically, it is contended that the statute requires the actual use of force, violence or intimidation in the attempted taking of property from a bank. We disagree. We respectfully submit that the claim is without merit and is, indeed, foreclosed by the recent decision of this Court in *United States* v. *Stallworth*, 543 F.2d 1038 (2d Cir. 1976).

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[6]The statute provides in pertinent part as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank. . . . Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both 18 U.S.C. § 2113(a).

In *Stallworth*, the would-be robbers prepared themselves by obtaining ski masks and surgical gloves prior to the robbery. Also prior to the date of the planned robbery, one of the robbers entered the target bank to examine its internal structure. On the date of the proposed robbery, after arming themselves with a shotgun and pistol, the robbers began to reconnoiter the bank. One of the robbers alighted from the getaway vehicle to examine the bank, while his accomplices circled the bank. When one of the robbers signalled to advance, the robbers approached the bank's doors. Before they could enter the doors, agents arrested the four men.

On appeal, it was argued that the conviction of Stallworth and Sellers had to be reversed because they could not be convicted of attempted bank robbery because they neither "entered the bank *nor brandished weapons.*" (emphasis added). *United States* v. *Stallworth*, *supra*, 543 F.2d at 1040.

There was thus squarely before the *Stallworth* court the identical issue presented in this appeal: namely, whether the actual use of force or violence is a necessary element of the crime of attempted bank robbery. The court resolved that issue in favor of the Government by affirming Stallworth's and Sellers' convictions and thus determining that the use of force or violence was not required in an attempt. Chief Judge Kaufman, writing for the court, stated:

> "[A]pellants assert they cannot be convicted of attempted bank robbery because they neither entered the bank nor brandished weapons. We reject this wooden logic. Attempt is a subtle concept that requires a rational and logically sound definition, one that enables society to punish malefactors who have unequivocally set out upon a

> criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled." *United States* v. *Stallworth*, *supra*, 543 F.2d at 1040.

United States v. *Stallworth* thus clearly stands for the proposition that the bank robbery statute does not require the use of force or violence in the case of attempted robberies for the sound and obvious reason that timely intervention before the actual use of force and violence prevents bloodshed. As Chief Judge Kaufman stated: "[F]ederal courts have upheld convictions for attempted bank robbery without evidence of either an assault, *United States* v. *Foster*, 478 F.2d 1001 (7th Cir. 1973), or actual entry into the target bank, *United States* v. *Bussey*, 507 F.2d 1096 (9th Cir. 1974)." *United States* v. *Stallworth*, *supra*, 543 at 1041.

To be rejected is appellant Jackson's claim that this case is distinguishable on its facts from *Stallworth* because he and his cohorts never performed a "substantial step toward the commission of the crime, conduct strongly corroborative of the defendant's criminal intent" *United States* v. *Stallworth*, *supra*, 543 F.2d at 1040. The argument borders on the frivolous. Apart from the minor difference that, unlike the instant case, the would-be robbers in *Stallworth* reached the doors of the bank, this case is virtually indistinguishable on its facts from *Stallworth*.

The uncontradicted testimony of Vanessa Hodges was that on June 14th she, Jackson and Allen intended to rob the bank, and that substantial steps were taken to further the plan. Appellants reconnoitered the bank, and the license plate number on their car was hidden to avoid detection. Hodges, Allen and Jackson then returned to Coney Island to get additional manpower (Scott). With

them they had two sawed-off shot guns, a pair of handcuffs (for the bank manager), masks and a pistol. Both Scott and Allen entered the bank to determine the location of the bank surveillance cameras. The judge could easily have found that the preparation had been completed. The only reason that the bank robbery was aborted, and possible bloodshed prevented, was the last minute decision that the bank was too crowded for a successful robbery.

With respect to the June 21st attempt also, the would-be robbers clearly evidenced, through their actions, their intention to rob the bank. First, they surveilled the bank in their car. Then Scott exited the sedan to observe the situation more closely. The license plates were again removed. The three were heavily armed with two sawed-off shotguns, masks, a pistol and a pair of handcuffs. Appellants' flight from the scene also reflected their purpose in being in the area of the bank. Again, there can be little question that a bank robbery would have occurred but for the fact that the would-be robbers sensed the presence of the FBI and fled.

In short, both the facts and the relevant law make it clear that appellants were properly convicted of attempted bank robbery.

POINT III

There Was Sufficient Evidence To Establish the Possession by Appellant Scott of Unregistered Sawed-Off Shotguns.

Appellant Scott challenges the judgment of conviction against him under Count Four of the indictment, in which he, along with the other appellants, was charged with knowingly and unlawfully possessing two single-barrelled

"pump action" 12 gauge saw-off shotguns which had not been registered to any of the appellants in the National Firearms Registration and Transfer Record.

Appellant Scott argues that there was no evidence that he owned, actually possessed, exercised dominion over, or even touched, the guns (Br., p. 10). He further argues that the applicable statute, 26 U.S.C. § 5861(d), does not prohibit constructive possession.

The evidence adduced at trial proved that Scott joined the conspiracy to rob the Manufacturers Hanover Trust Company on June 14, 1976. Prior to the time Scott joined the conspiracy, Jackson and Allen obtained one sawed-off shotgun and a pistol. Scott agreed to participate in the robbery after having been told of the plans of the others. Thereafter, another sawed-off shotgun was obtained by appellant Allen. Scott, along with the others, then surveilled the bank, with the guns in the car in which he was riding. Just a week later Scott and Jackson and Allen again prepared to rob the bank, arriving at approximately 7:00 A.M. with their weapons. Both shotguns were loaded.

While it is clear that mere proximity to an unregistered firearm is not sufficient to sustain a conviction for violating 26 U.S.C. § 5861(d), cf. *United States* v. *Gates*, 491 F.2d 720, 721 (7th Cir. 1974), proximity, along with an intention, at a given time, to exercise dominion and control over the firearm, either directly

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[7] It shall be unlawful for any person . . .

* * * * *

(d) to receive or possess a firearm which is not registered to him in the National Firearm's Registration and Transfer Record; . . . .

or through others, will satisfy the requirements of the statute, *United States* v. *Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973); *United States* v. *Holt*, 427 F.2d 1114, 1117 (8th Cir. 1970); *United States* v. *La Gue*, 472 F.2d 151, 152 (9th Cir. 1973). Similarly, possession may be joint as well as exclusive. *United States* v. *Holt*, *supra*, 427 F.2d at 1116-1117.

In the instant case the evidence more than amply supports the conclusion that the appellant Scott knew that the firearms were in the car and knew and intended, along with his co-conspirators, that the firearms be used by them in the planned robbery. All three co-conspirators exercised co-equal dominion and control over the guns, appellant Scott is thus chargeable with their possession, cf. *United States* v. *Holt*, *supra*.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
February 18, 1977

Respectfully submitted,

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Joanne Bracco

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NOTARY PUBLIC, State of New York
No. 41-4613298
Qualified in Queens County
Term Expires March 30, 1977